

# EXHIBIT A

O2CANWC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 NEW YORKERS AGAINST CONGESTION  
4 PRICING TAX, *et al.*,

5 Plaintiff,

6 v.

24 Civ. 367 (LJL)

7 UNITED STATES DEPARTMENT OF  
8 TRANSPORTATION, *et al.*,

Conference

9 Defendants.

10 -----x

-----x

11 ELIZABETH CHAN, ET AL.,

12 Plaintiffs,

13 v.

23 Civ. 10365 (LJL)

14 UNITED STATES DEPARTMENT OF  
15 TRANSPORTATION *et al.*,

16 Defendants.

17 -----x

18  
19 New York, N.Y.  
20 February 12, 2024  
10:07 a.m.

21 Before:

22 HON. LEWIS J. LIMAN,

23 District Judge

O2CANEW C

## APPEARANCES

LAW OFFICES OF JACK L. LESTER

Attorneys for Plaintiff New Yorkers Against Congestion  
Pricing Tax

BY: JACK L. LESTER

STEPOE LLP

Attorneys for Plaintiff Chan, et al.

BY: ALAN KLINGER

DINA KOLKER

DAVID KAHNE

KAPLAN HECKER &amp; FINK LLP

Attorneys for Defendant TBTA, et al.

BY: ROBERTA ANN KAPLAN

GABRIELLE TENZER

SIVE, PAGET &amp; RIESEL, P.C.

Attorneys for Defendant TBTA, et al.

BY: MARK CHERTOK

ELIZABETH KNAUER

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL

Attorneys for Defendant NYS Department of Transportation

BY: ANDREW FRANK

NEW YORK CITY LAW DEPARTMENT

Attorneys for Defendant NYC Department of Transportation

BY: NATHAN TAYLOR

DOJ-USAO

Attorneys for Defendant US Department of Transportation,  
FHA, et al.

BY: ZACHARY BANNON

O2CANEW C

(Case called)

MR. LESTER: Good morning, Judge. Jack Lester for the plaintiffs.

THE COURT: Good morning, Mr. Lester.

MR. KLINGER: Good morning, your Honor. Alan Klinger from Steptoe for the Chan plaintiffs.

THE COURT: Good morning.

MR. KAHNE: Good morning, your Honor. David Kahne also from Steptoe for the plaintiffs.

MS. KOLKER: Good morning. Dina Kolker from Steptoe for plaintiffs and Chan plaintiffs.

THE COURT: For the defendants?

MR. BANNON: Zach Bannon from the U.S. Attorney's Office for the federal defendants.

MR. TAYLOR: Nathan Taylor with the New York City Law Department for the New York City Department of Transportation.

MR. FRANK: Andrew Frank from the New York State Attorney General's Office on behalf of the State Department of Transportation.

MS. KNAUER: Elizabeth Knauer from Sive Paget & Riesel for the MTA and TBTA defendants.

MR. CHERTOK: Mark Chertok also from Sive, Paget & Riesel for MTA, TBTA, and TMRB.

MS. KAPLAN: Roberta Kaplan from Kaplan Hecker for the MTA and related defendants.

O2CANEW

1 THE COURT: Good morning. So there are two counsel  
2 for the MTA; is that correct?

3 MS. KAPLAN: There are, your Honor. Kaplan Hecker and  
4 Sive Paget.

5 THE COURT: Okay. So I scheduled this conference as a  
6 status conference and something of a scheduling conference for  
7 two cases that appear to me to be related – the 23cv10365 case  
8 and the 24cv367 case. I laid out an agenda for the conference  
9 in the order that I issued.

10 What I'd like to do is hear first from the plaintiffs,  
11 and for lack of a better way of organizing it, from the  
12 plaintiffs in the first filed case and then from the plaintiff  
13 in the later filed case about the case, what they want me to  
14 know about the case, about the plans that I should have for  
15 managing the case, the timing of any expected motions including  
16 the timing of the filing of the certified administrative  
17 record. I indicated the question of whether discovery is  
18 contemplated and then a position with respect to settlement.  
19 And then I'll go through with respect to the defendants the  
20 same set of questions.

21 I noted in my order that there are actions also  
22 challenging congestion pricing in the District of New Jersey  
23 and in the Eastern District of New York, and if anybody is able  
24 to give me an update on those cases and any effect those cases  
25 might have on this case, that would also be appreciated.

O2CANEW

1           So why don't we start with the plaintiff in the first  
2       filed case.

3           MR. KLINGER: Yes, your Honor. Thank you.

4           As we indicated in our letter to the Court, we've only  
5       recently been retained here, but we've been working on it  
6       since. Our intention as to your first point is to amend the  
7       pleading to add certain allegations about the attempted  
8       involvement by the Chan plaintiffs in the process to perform  
9       the environmental review and how that was stymied. Your Honor  
10      asked about the overall nature of the case. This case, in  
11      essence, challenges the Federal Highway Authority's approval of  
12      congestion pricing with a finding of no significant impact.  
13      The claim here is the plaintiffs in this case, they're not  
14      against congestion pricing. We wanted to make that clear. We  
15      don't think that there was appropriate environmental review  
16      done here. The acronym goes by FONSI, finding of no  
17      significant impact, we challenge that. And the significant  
18      basis for that, your Honor, is a sister federal agency, the  
19      EPA. When the EPA commented, the EPA said that they were not  
20      convinced that there was no significant impact and they  
21      recommended that there be additional studies done because  
22      whereas the congestion pricing plan will divert traffic from  
23      the Manhattan business district and will presumably ease some  
24      congestion and some air pollution there, the findings of the  
25      federal agencies reviewing this acknowledge that because of

O2CANEW

1 that diversion of traffic, there are going to be other areas  
2 where the congestion will get worse, the air pollution will get  
3 worse, there will be safety issues.

4 The core group of the present plaintiffs is Battery  
5 Park City, which Battery Park City, your Honor, is right  
6 adjacent to one of the exempted thoroughfares. So there will  
7 be a lot more traffic and there will be resulting increased air  
8 pollution, noise pollution, and other aspects right there where  
9 10,000 people reside. And it's not just 10,000 people. There  
10 are five public schools in the area. There are playgrounds in  
11 the area that will all be impacted.

12 And what we are asking for, your Honor, is that there  
13 actually be an environmental impact statement performed, which  
14 is typically what happens in tolling cases around the country.  
15 And here we don't really have to guess at the motivation of  
16 what happened because defendants laid it out for us. They said  
17 that -- they say and it's now the head of the MTA who is in  
18 a -- I think chief department officer at the time, came and  
19 reported that they worked it out with the Federal Highway  
20 Administration that the environmental review is going to be  
21 fast tracked. That's the actual language that is used.

22 And so that we say, your Honor -- you'll hear from  
23 defendants that there were thousands of pages in the record.  
24 There are thousands of pages in the record, but quantity  
25 doesn't equal quality in terms of the nature of the review.

O2CANEW

1           So that is what we are asking is, again, that there be  
2           a full environmental impact statement. And the other part  
3           where they've laid a road map for the challenge, your Honor, is  
4           that part of what you're supposed to do is consider other  
5           alternatives to see whether those alternatives can accomplish  
6           the goal without some of the deleterious effects. All the  
7           other alternatives were dismissed because they wouldn't raise  
8           enough money. That's what was going on here, your Honor. It  
9           isn't so much the congestion pricing as they want a billion  
10          dollars a year or 15 -- to be able to fund a 15 billion-dollar  
11          capital project and that's why they swept away all the other  
12          alternatives that could reasonably accomplish the goal of  
13          reducing congestion, but not without the adverse impacts in  
14          Battery Park City.

15          Your Honor, just to jump ahead for a moment. We are  
16          cocounsel in the case in the Eastern District of New York. And  
17          so that we are all in favor of coordination of discovery. And  
18          we'll get to this last part about settlement in a minute, your  
19          Honor. But when you have that case, which also echoes with  
20          Mr. Lester, is that not only Battery Park City but other areas,  
21          South Bronx, northern part of Staten Island, the study that was  
22          done acknowledges that there's going to be significant  
23          increased air pollution there. So, again, that's sort of the  
24          nuts of the basis of the challenge.

25          THE COURT: Let me ask you about your reference to an



O2CANEW

1 amended complaint. How do you propose to amend the complaint,  
2 and when do you intend to file your amended complaint?

3 MR. KLINGER: Your Honor, we would like to file it  
4 within two weeks from today so as not to delay matters.

5 THE COURT: And what can I expect in terms of the  
6 nature of the amendments?

7 MR. KLINGER: Nature of the amendments will spell out  
8 more the attempts from this group to have the concerns of  
9 Battery Park City addressed in the record. And, your Honor, as  
10 best as we can tell, and we haven't been in the case that long,  
11 but as the best we can tell -- there's no discussion of Battery  
12 Park City and the impact there -- sorry, your Honor -- whereas  
13 there is discussion about impacts in other communities.  
14 Battery Park City is 92 acres, 10,000 people.

15 THE COURT: Help me with how the efforts of I guess  
16 your clients to be heard and the fact that they were not heard,  
17 at least to the extent that you claim they should have been,  
18 adds to your claim. How is that relevant to your claim as to  
19 whether an environmental impact statement should have been  
20 prepared?

21 MR. KLINGER: Because, your Honor, it would go to the  
22 fact that significant issues weren't addressed. So that when  
23 you have a FONSI where it says that there's no significant  
24 issues, no significant impact, how can they conclude that, your  
25 Honor, when they didn't even look at what the issues are that

O2CANEW

1 are relevant to the plaintiff group?

2 THE COURT: Did that group submit -- I take it there  
3 was a notice and comment period, correct?

4 MR. KLINGER: Yes, there was, your Honor, and yes,  
5 they did.

6 THE COURT: And so what is it that you claim didn't  
7 happen during the notice and comment period that should have  
8 happened? I guess what I'm trying to figure out is what your  
9 allegations are going to add to what I can read in the  
10 administrative record and the arguments you can make from that.

11 MR. KLINGER: Your Honor, an assessment of the actual  
12 impact would be for air pollution, noise pollution, parking.  
13 Part of the concerns are that you're going to hear from various  
14 groups of plaintiffs is that because of diversion of traffic --  
15 and here traffic will be diverted because the West Side  
16 Highway -- West Street, West Side Highway is an exempted  
17 thoroughfare -- that since there's going to be more traffic  
18 going through there, it is going to add to the deterioration of  
19 air quality, noise pollution, and other safety hazards.

20 THE COURT: And we may be talking past each other.  
21 Wouldn't all of that be in the comments that your client  
22 submitted to the agency?

23 MR. KLINGER: But, your Honor, what our clients  
24 wouldn't have is whether these concerns were actually examined  
25 or looked at by the federal agency that's performing the

O2CANEW

1 environmental review. That's what we're seeking to ascertain.

2 THE COURT: So what is it that the allegations will  
3 add to what's already in the complaint?

4 MR. KLINGER: That, your Honor, the allegations  
5 would --

6 THE COURT: And in the administrative record.

7 MR. KLINGER: Yes. They would add for us to be able  
8 to assess or show the absence of any consideration of the  
9 issues that are relevant to Battery Park City residents.

10 THE COURT: And you're saying that that would be  
11 established from the administrative record and you think it's  
12 not sufficiently pled in the existing complaint?

13 MR. KLINGER: Yes. And I want to add to the  
14 particulars of that, your Honor, we're also under discussion  
15 about whether to add two claims for relief that were brought in  
16 the Eastern District, the action in the Eastern District of New  
17 York.

18 THE COURT: What are those?

19 MR. KLINGER: A violation of the Green Amendment,  
20 which is the state provision that speaks to the need to  
21 consider environmental impact. That, your Honor, I feel  
22 comfortable saying at this stage we will be adding. We are  
23 looking, your Honor, at claims under the Dormant Commerce  
24 Clause and the right to travel, to see whether those would be  
25 appropriate here. We don't want to add them, your Honor, as a

O2CANEW

1 knee-jerk reaction, but we're trying to assess that working  
2 with a plaintiff's group.

3 THE COURT: Okay. On the assumption that we establish  
4 a schedule for you to file an amended complaint two weeks from  
5 today, what would the next steps be in this case from your  
6 perspective?

7 MR. KLINGER: Well, our next steps would be to proceed  
8 to discovery. I have a feeling you're going to hear about  
9 motions to dismiss. But we would --

10 THE COURT: Why would there be discovery in this case?  
11 It's a case where the challenges are under the APA and NEPA,  
12 and why is any discovery necessary beyond what's in the  
13 administrative record, and what is the discovery?

14 MR. KLINGER: One of the areas we would wish to  
15 explore is the reaction to the defendants to the EPA submission  
16 saying that they thought the environmental review is inadequate  
17 and discussions of that nature.

18 THE COURT: That doesn't quite answer my question.  
19 That answers half the question, which is the question of what  
20 you're seeking. Is that through depositions?

21 MR. KLINGER: First, it would be document requests,  
22 your Honor, and then we would assess that.

23 THE COURT: And then why would that be appropriate  
24 given the nature of the challenges in this case?

25 MR. KLINGER: Well, I think it's relevant, your Honor,

O2CANEW

1 whether the reaction from the reviewing agency, the reaction  
2 to --

3 THE COURT: No, no, I guess in a case where -- let's  
4 put aside for the moment the Dormant Commerce Clause and the  
5 state claim. Under the APA claim and the NEPA claim, what  
6 would any discovery be permissible if you're challenging the  
7 lawfulness of an agency action? Isn't the record appropriately  
8 limited to what is in the administrative record?

9 MR. KLINGER: We would assess, your Honor, again, as  
10 we get further into the case.

11 THE COURT: Okay. All right. You want to go through  
12 the other items in my list.

13 MR. KLINGER: Yes, surely, your Honor.

14 As we expressed in the -- the Chan group of plaintiffs  
15 are amenable to a settlement conference. We can fill your  
16 Honor in and combine two of the things that you asked about  
17 that the -- it was the magistrate judge right in the Eastern  
18 District of New York asked the same questions as your Honor,  
19 and we accepted and were responsible for combining all the  
20 responses from the various defendants. I mean, some of them  
21 are plainly here today. And I think I have this right, your  
22 Honor, is whereas the defendants were not interested in  
23 settlement of an individual case, I think everyone agreed that  
24 they would be willing to participate in a conference having to  
25 do with -- if it was a global settlement. And, your Honor,

O2CANEW

1 defense counsel can speak --

2 THE COURT: Yeah, I'll hear from them.

3 MR. KLINGER: So that would be -- so, again, I do  
4 think a global settlement conference is something we would be  
5 interested in for Chan --

6 THE COURT: And I presume if there's interest in that,  
7 the plaintiffs would organize that or the defendants and it  
8 would be in front of the magistrate judge for the Eastern  
9 District. Have you given thought to that? From my  
10 perspective, I'm indifferent to how you structure your  
11 settlement discussions. I would help to facilitate it if  
12 there's interest in me doing so.

13 MR. KLINGER: Your Honor, the Chan plaintiff, since we  
14 also represent the -- we're cocounsel in the Eastern District  
15 matter, we are in the United Federation of Teachers and some of  
16 the other parties there, we would be happy to coordinate if  
17 there was to be a global settlement conference. I can  
18 represent that we've spoken with cocounsel in the Eastern  
19 District of New York action and there will be -- we have told  
20 the Court there that we would be willing to participate in a  
21 global settlement. And, your Honor, we would be, I mean,  
22 indifferent is probably not the right word, and we would be  
23 willing to participate either under the auspices of your Honor  
24 or the judge in the Eastern District of New York. And if it  
25 made a difference to defense counsel, we would be happy to

O2CANEWC

1 speak to them about that.

2 THE COURT: Let me ask you the other questions that  
3 I've got.

4 Since you mentioned that you are cocounsel in the  
5 Eastern District of New York or counsel in the Eastern District  
6 of New York, has there been a schedule set in that case for  
7 motions? And more broadly, how in your view should I manage  
8 this case so that I'm not replicating what is being done by  
9 judges in other districts?

10 MR. KLINGER: Your Honor, the initial settlement  
11 conference in that case is this coming Friday.

12 THE COURT: That's initial status conference?

13 MR. KLINGER: Yes. And they have sought information  
14 very similar to what your Honor did in your order.

15 THE COURT: Okay. Have you given any thought to  
16 coordination between the cases? If there are going to be  
17 similar motions filed in each, it's obviously a question I'm  
18 going to ask defense counsel, but from plaintiff's perspective,  
19 why is -- maybe you're the earliest filed case among all of the  
20 districts. I don't know the answer to that. But what  
21 efficiency is there in having cases filed in the Southern  
22 District of New York, the Eastern District of New York, and the  
23 District of New Jersey that seem to involve the identical legal  
24 issues with an identical administrative record?

25 MR. KLINGER: Yes. And, I mean, so what was done with

O2CANEW

1 the District of New Jersey was there was a stipulated  
2 administrative record and we would -- we will be in  
3 consultation with plaintiff's attorney there to see about their  
4 willingness to be involved if there is a global settlement  
5 conference. That case, your Honor, is the most advanced of  
6 all. I believe there have been summary judgment motions filed  
7 in that case.

8 THE COURT: Do you have a position as to whether I  
9 should stay any action in this case pending the outcome of  
10 motions in that case?

11 MR. KLINGER: We would need to discuss that with our  
12 client and then with counsel.

13 THE COURT: Okay.

14 MR. KLINGER: But, your Honor, back to your prior  
15 question, we would certainly be interested in coordinating  
16 discovery among the matters. There is no reason -- if  
17 discovery is to be had, there's no reason that it has to be  
18 replicated in three or four different places.

19 THE COURT: Okay. All right. Let me hear from  
20 Mr. Lester.

21 MR. LESTER: Good morning.

22 THE COURT: Mr. Lester, how does your case differ from  
23 the case that Mr. Klinger is handling?

24 MR. LESTER: Well, it differs in two respects. First,  
25 we represent environmental justice communities, East Harlem,



O2CANEW

1 South Bronx, Lower East Side. Those communities will be  
2 suffering from traffic diversion, and environmental impact  
3 statement, it called for mitigation that was not accomplished.  
4 Because they did the FONSI, they did not have to do mitigation,  
5 come up with alternatives, and that would be required for those  
6 communities.

7 So our case differs --

8 THE COURT: I'm not sure I hear a difference other  
9 than you've got a different group of clients.

10 MR. LESTER: Right. But we highlight that issue as  
11 opposed to their case, which emphasizes Battery Park City.

12 THE COURT: Now, I've noticed that you also have class  
13 allegations in your case.

14 MR. LESTER: Yes, and that's the other difference.

15 THE COURT: Are you contemplating moving for class  
16 certification, and what is the efficiency or justification for  
17 bringing this as a class action rather than on behalf of the  
18 individuals that you've got? I guess I can understand maybe  
19 from the defendant's perspective there would maybe be an  
20 advantage that they could bind everybody. But from the  
21 plaintiff's perspective, why is this being done as a class  
22 action?

23 MR. LESTER: Well, if there are alternatives and  
24 mitigation, we want that to apply to the community in general.  
25 So, for example, South Bronx has certain needs that the Lower

O2CANEW

1 East Side may not have or East Harlem. So by bringing it as a  
2 class action, we have representative plaintiffs and, therefore,  
3 any remedy could apply to the class.

4 THE COURT: And is it your position that that wouldn't  
5 be the case if the case goes forward with the individual  
6 plaintiffs that you've got who are members of each of these  
7 different communities?

8 MR. LESTER: Well, it's possible that if we had a  
9 declaratory judgment on behalf of one individual that applied  
10 to the entire class, that that would be appropriate. But I  
11 think as a prophylactic measure to bring it as a class action  
12 creates some extra viability and there would be notice to the  
13 class. There could be monetary damages that would have to  
14 apply to the class as well.

15 THE COURT: What's the nature of -- give me a moment.

16 MR. LESTER: So, for example --

17 THE COURT: I'm sorry. I don't see in your complaint  
18 a request for monetary damages. I do see requests for various  
19 types of declaratory relief and injunctive relief and for the  
20 payment of costs. Is there something I'm missing?

21 MR. LESTER: I think we request certain monitoring  
22 that should occur and that could be unique to each community.

23 THE COURT: Okay. But you're not seeking monetary  
24 damages at this point?

25 MR. LESTER: Well, in order to accomplish monitoring,

O2CANEWC

1 it would probably have to be some compensation, some  
2 appropriation of funds.

3 THE COURT: Well, in other words, am I correct in  
4 understanding that the monitoring, if I ordered it, would have  
5 to be paid for by the defendants, but that you're not seeking  
6 monetary relief on behalf of members of the class?

7 MR. LESTER: Correct.

8 THE COURT: That's correct?

9 MR. LESTER: Correct.

10 THE COURT: So how do you propose to prosecute this  
11 case? Are you going to be seeking discovery? Do you have a  
12 view with respect to how I coordinate it with the case that was  
13 filed by Mr. Klinger? Why don't you address those issues.

14 MR. LESTER: Well, I think the administrative record  
15 is fairly complete. I mean --

16 THE COURT: I understand it's also pretty lengthy.

17 MR. LESTER: Right. So the issue there for us is that  
18 in the record, the EPA indicated that there should be a full  
19 environmental impact statement, and there should be mitigation,  
20 there should be alternatives. But the FONSI, in contradiction  
21 to the facts laid out by the environmental assessment,  
22 contradicted the facts. So I think in terms of the record,  
23 we're pretty confident that we could base our case and win a  
24 motion for summary judgment based on the record. But insofar  
25 as plaintiffs in the companion case endeavor into discovery, we

O2CANEW

1 would cooperate and join with that.

2 THE COURT: Anything else I should know from your  
3 perspective?

4 MR. LESTER: Well, I think in terms of a global  
5 settlement, we're certainly allied with the other plaintiffs.  
6 We think it should be handled efficiently in one jurisdiction.  
7 All the plaintiffs should be joined under one roof as it were.  
8 I mean, it doesn't pay to have inconsistent verdicts and  
9 inconsistent judgments. That would not encourage judicial  
10 economy.

11 THE COURT: And what about coordination of the cases  
12 with the Eastern District and the District of New Jersey and  
13 the question of whether I should stay any action in this case  
14 pending a decision by the District of New Jersey? You do seem  
15 to be something of a latecomer to this litigation.

16 MR. LESTER: Again, we would take that under  
17 advisement, consult with the other plaintiffs and my client.

18 THE COURT: Okay.

19 MR. LESTER: But I do want to emphasize we have one  
20 additional issue. There's currently public hearings through  
21 the TMRB, the Transit Mobility Review Board, and they're  
22 governed by the State Administrative Procedure Act. And we  
23 have many plaintiffs who are small business people, employees  
24 of small businesses, and they will be economically and  
25 financially harmed, and the state administrative procedure

O2CANEW

1 calls for an evaluation of economic impacts. And the failure  
2 of the EIS process to do that requires that the final  
3 environmental assessment take into account the financial and  
4 economic impacts. And, therefore, there would have to be a  
5 supplemental EIS.

6 THE COURT: Okay.

7 MR. LESTER: So that's an additional claim that we  
8 have.

9 THE COURT: Okay. All right. Thank you.

10 MR. LESTER: Thank you.

11 THE COURT: All right. I'll hear from whoever on the  
12 defense side wants to go first. It would be helpful for  
13 somebody on the defense side, maybe at the beginning, to lay  
14 out the contemplated timetable for the implementation of  
15 congestion pricing. I'm aware that that has been laid out in a  
16 case in the District of New Jersey, but I haven't heard it  
17 firsthand and I think that will help frame the handling of  
18 this. Ms. Kaplan.

19 MS. KAPLAN: Yes. Thank you, your Honor.

20 So let me just touch on that and touch on kind of the  
21 landscape right now of the various cases, your Honor.

22 Your Honor has it exactly right. There are two cases  
23 in the District of New Jersey, there are two cases before your  
24 Honor, and there's a case in the Eastern District. We have  
25 told Mr. Klinger that we intend to move to change venue for the

O2CANEW

1 Eastern District case to move it to your Honor. We think it  
2 makes no sense to have a case in the SDNY and the EDNY at the  
3 same time. The cases are the same; the facts, the law is the  
4 same, as your Honor as pointed out.

5 THE COURT: How quickly do you contemplate making that  
6 motion in the Eastern District? I gather you've got a  
7 conference coming up later this week.

8 MS. KAPLAN: We would file it today, your Honor, but  
9 we're waiting to hear back from Mr. Klinger on a motion  
10 schedule. That's what Judge Gujarati requires before you file  
11 a motion. So as soon as he gets back to us with a motion  
12 schedule, it's ready to go and file that as soon as possible.  
13 And we actually think they should consent to that given that  
14 they're counsel to both cases.

15 But, in addition to that, your Honor, you said before  
16 that you're a latecomer to the case.

17 THE COURT: I didn't -- maybe I personally am a  
18 latecomer. I also meant to say that Mr. Lester seems to be a  
19 latecomer.

20 MS. KAPLAN: I'm a little bit of a latecomer, too,  
21 your Honor. But with respect to New Jersey, I would say that  
22 you're a latecomer, but you're not a latecomer. And the reason  
23 for that, your Honor, is because the New Jersey case has been  
24 through four judges I think. The judge who's the current judge  
25 on the case, Judge Conner, was recently assigned -- Gordon,

O2CANEW

1 excuse me -- was recently assigned. It is true that summary  
2 judgment is fully briefed in that case and is sub judice, but  
3 the judge is almost as much of a newcomer to the issues in  
4 these cases as your Honor is.

5 In terms of the timetable for our clients, let me be  
6 very clear. The law that require there to be congestion  
7 pricing was passed in the State of New York in 2019. We're now  
8 five years past that point. Our client, understandably, your  
9 Honor, feels a great responsibility to implement the congestion  
10 pricing plan their people have worked on these past many years  
11 as soon as possible. Our hope is to do so in June of this  
12 year. And, as you can imagine, your Honor, given what I've  
13 already said, from our client's perspective, what they want is  
14 expediency and finality. They would like a decision and they  
15 would like to move forward.

16 And that takes me -- I'm going to let my environmental  
17 counsel respond to any questions about environmental law, your  
18 Honor, because I'm not even going to pretend to know what I'm  
19 talking about there. But let me say that with respect to  
20 settlement, given what I've already said, your Honor must be  
21 able to imagine what we're thinking. We certainly would want  
22 there to be finality. If a global settlement process led to  
23 finality for our clients, that would be great. There are  
24 claims that have been filed in some of the actions or are  
25 contemplated being filed in these actions, constitutional

O2CANEW

1 claims under right to travel, Dormant Commerce Clause that  
2 probably aren't ripe yet. So we would have to figure out  
3 finality on that end to settle, but that is very much in our  
4 interest if we can get it. The only other thing I would add  
5 before environmental issues --

6 THE COURT: Maybe, Ms. Kaplan, I assume you'll touch  
7 on what are in some ways related issues, sort of how to manage  
8 the cases across the districts. You answered that in part with  
9 respect to the Eastern District of New York, and then the  
10 question of class certification, which as to the APA claims,  
11 the administrative claims, seems to me to make very little  
12 sense. But it may actually with respect to the Dormant  
13 Commerce Clause claims have more sense to it. I don't know if  
14 you've given any thought to how to structure -- how I should  
15 structure things, how things should be structured so as to  
16 achieve what I would hope would be everybody's goals of  
17 efficiency and expediency.

18 MS. KAPLAN: So our current thinking again, your  
19 Honor, subject to my colleagues, would be that in the -- that  
20 the EDNY case get moved here, and then that here we would file  
21 a motion for summary judgment. We agree with your Honor that  
22 there's no discovery in connection with the environmental  
23 claims, a motion for summary judgment on the administrative  
24 record, so the administrative record is before your Honor in  
25 the Chan case.



O2CANEW C

1           If there are constitutional claims or other claims  
2       that are pled that are unripe, we would move to dismiss those  
3       claims as unripe at this point in time. If they become ripe,  
4       once the plan is implemented, we could deal with that then, but  
5       we don't think there's any necessity for class now because the  
6       claims just aren't ripe in terms of the constitutional or other  
7       related claims that they talked about. We would like to do  
8       that as quickly as possible. We don't think there would have  
9       to be a lot. And, again, I'm going to defer to my  
10      environmental colleagues, but we're basically ready to move for  
11      all intents and purposes because we've already done it once in  
12      New Jersey. And then in terms of global settlement, the one --

13           THE COURT: And let me interrupt you again for a  
14      second because after looking at your colleague, you added what  
15      may or may not be an important caveat, which is summary  
16      judgment in the Chan case. Explain that to me and, if that's  
17      what happens, what I do with respect to the New Yorkers Against  
18      Congestion Pricing.

19           MS. KAPLAN: Yeah. One thing I know, your Honor, is  
20      when to speak and when not to speak, so I'm going to defer to  
21      my environmental colleagues.

22           THE COURT: All right. I'll call on you, Ms. Kaplan,  
23      with respect to the rest.

24           You'll identify yourself again for the record.

25           MR. CHERTOK: Perhaps we should back up a couple of

O2CANWC

1 steps before I get to answer your question. This is a case  
2 brought under the National Environmental Policy Act, or NEPA.  
3 Plaintiffs allege that the environmental assessment and the  
4 resulting finding of no significant impact were inadequate.  
5 What they don't say is that there were extensive studies of  
6 traffic patterns that would result from congestion pricing over  
7 a 28-county area, which by definition included Battery Park,  
8 the Lower East Side, the Bronx, and other areas of New York  
9 State, as well as New Jersey and Connecticut.

10 That study went over for four years. So this notion  
11 of a fast track is vernacular. There is no fast track when it  
12 comes to a federal agency doing environmental studies, as your  
13 Honor is probably well aware.

14 Their claim is that there's a need for discovery  
15 because EPA commented and there was no response to those  
16 comments. That's just simply wrong. EPA signed off on the  
17 final environmental assessment. So the notion that you need  
18 discovery is a nonstarter, and an administrative record would  
19 show whatever EPA said, in any event.

20 The issue about the environmental justice communities  
21 that Mr. Lester mentioned, there were extensive studies of  
22 potential impacts on such communities in basically a 12-county  
23 area, including all the areas which Mr. Lester mentioned.  
24 There was a discussion of whether there could be impacts on  
25 communities that were already burdened by historic land use

O2CANEW

1 decisions that are unrelated to the project. And the project  
2 includes a discussion of potential impacts and includes  
3 mitigation, \$155 million worth of mitigation in these areas.  
4 So the notion that there was no study and no mitigation is  
5 simply belied by the administrative record. And the notion  
6 that there is no alternatives fails on a very fundamental  
7 point.

8           The purpose of the project as set forth in the  
9 legislation is two-fold. One is to limit and reduce congestion  
10 in the most crowded urban area in the country, New York City,  
11 in particularly the central business district; and, secondly,  
12 to guarantee a source of income for the MTA for transit  
13 improvements. And those theories go hand in hand. So the  
14 notion that because alternatives were excluded, for example,  
15 because they could not raise sufficient funds, is perfectly  
16 appropriate and well settled under environmental and NEPA  
17 cases.

18           So with that basic background, without getting too  
19 much into the merits, the Chan case has a single NEPA claim,  
20 and the administrative record will demonstrate, as your Honor  
21 noted, whether or not the Chan plaintiffs commented on the  
22 draft and environmental assessment, which was subject to a  
23 44-day comment period.

24           Second, that claim is the only claim right now in the  
25 Chan case. So let me switch for a moment to the other case,

O2CANEW

1 the New Yorkers case. There's a NEPA claim there. That claim  
2 is time barred. Under the governing statutes, Section 139 of  
3 the Transportation Act, that claim had to be filed by  
4 November 27, 2023. So the word "latecomers" applies. That  
5 claim is time barred.

6 Second, there's a claim that there should have been  
7 some type of --

8 THE COURT: And is that claim essentially duplicative  
9 of the claim in the Chan case?

10 MR. CHERTOK: As best one could tell, but it claims  
11 various -- the New Yorkers case is focused more on the Lower  
12 East Side. The Chan case is focused on the Lower West Side,  
13 but they both claim an inadequate assessment. But under the  
14 federal statutes, there's a notice issued in the Federal  
15 Register in June of last year -- I think it was June -- which  
16 required 150-day statute of limitations and that was not met.

17 There's a claim also --

18 THE COURT: I guess my question was going to the  
19 issues of -- if part of the objective is efficiency and  
20 expediency, I would want to make sure that whatever I resolve  
21 with respect to the Chan case, I wouldn't have to redo it in  
22 connection with the New Yorkers Against Congestion Pricing,  
23 Mr. Lester's case. So I could imagine requiring briefing on  
24 the statute of limitations question. Or if what you're saying  
25 is that the result of the Chan case, Chan is sufficiently

O2CANEW

1 broadly pleaded that whatever I decide with respect to Chan  
2 would be dispositive with respect to the first cause of action  
3 under Mr. Lester's case, that also would address the question.

4 MR. CHERTOK: It's hard to tell the scope of the  
5 arguments that would be made in Chan because we haven't seen  
6 either an amended complaint, or more importantly, a summary  
7 judgment motion. But it would do two things. One, it would  
8 eliminate potential additional claims. And, two, I believe it  
9 would eliminate the class action claims because those claims  
10 appear to be based on the NEPA claims. So if there's no valid  
11 NEPA claim, then there should be no class action claim.  
12 Although, I don't think there is class action claim anyway  
13 under the APA, but put that aside for a moment.

14 The other claim that was raised under NEPA was the  
15 notion that there has to be some kind of a reassessment or  
16 supplement. As Ms. Kaplan indicated, we're currently in the  
17 middle of a review under the State Administrative Procedure Act  
18 for the Triborough Bridge and Tunnel Authority to adopt a final  
19 tolling structure. In the EA, there was an evaluation of seven  
20 scenarios with different amounts of credits, different amounts  
21 of tolls, different exemptions, etc. And so when the final  
22 tolling structure is adopted, FHWA has already committed in the  
23 FONSI to reevaluate to -- under the final tolling structure to  
24 make sure the conclusions of the FONSI remain valid. That  
25 cannot occur until there's a final tolling structure, ergo the

O2CANEW

1 claim for that supplementation is also unripe.

2 THE COURT: Is there expected timing for those  
3 actions?

4 MR. CHERTOK: Yes, and I can give you that timing.  
5 The hearings will be in late February, early March. And a  
6 decision by the Triborough Bridge and Tunnel Authority Board is  
7 not expected before the end of March. Once that decision is  
8 made, then there will need to be a reevaluation. I cannot tell  
9 you how long FHWA would take. It depends on I think to the  
10 extent of the structure, the extent to which the toll structure  
11 may vary from the different scenarios that were evaluated. But  
12 that evaluation will take place expectedly during the April,  
13 May timeframe. And I'm giving you rough estimates, your Honor.

14 Then, after that, there will be -- in order for the  
15 tolling to commence, there needs to be an agreement between the  
16 project sponsors, that is, TBTA and the New York City and state  
17 Departments of Transportation with FHWA called the Value Pilot  
18 Pricing Agreement. I might have gotten those words inverted.  
19 The VPPP for short. Once that agreement is signed and  
20 effective, then the actual tolling can start. And as  
21 Ms. Kaplan indicated, that's not expected before the middle of  
22 June.

23 THE COURT: But that it would be implemented by the  
24 middle of June?

25 MR. CHERTOK: Not sooner than the middle of June

O2CANEW

1 because there's not an exact timeframe by either the decision  
2 by the TBA Board, or more importantly, the extent and the  
3 timing of the reevaluation by FHWA. So there's no timeframe  
4 that's required. It could take fairly short. It could take a  
5 longer period of time. There's no way to tell.

6 THE COURT: The reason why I'm asking about the middle  
7 of June has to do with the timing of motions. I think it would  
8 be in the interest of everybody here, without any promises to  
9 be made by the Court, that if there is to be a holdup, it's not  
10 as a function of either the lawyers here not being sufficiently  
11 expeditious in their briefing and not giving me sufficient time  
12 to look at the papers.

13 MR. CHERTOK: Understood, your Honor.

14 THE COURT: So not earlier than the middle of June,  
15 but possibly sometime within the month of June if not a little  
16 bit afterwards.

17 MR. CHERTOK: Correct, your Honor. And that's the  
18 latest we have on a schedule. If it changes, obviously, we  
19 would inform the Court of that.

20 There is one other point I do want to make.  
21 Mr. Lester includes a claim under the State Administrative  
22 Procedure Act. The claim is that there should have been more  
23 extensive studies done on certain types of impacts on jobs,  
24 etc. That is based on the assumption that this is a rule  
25 making. And the MTA's position is that it is not a rule

O2CANEW

1 making, it's a rate making, which does not require those type  
2 of studies even though some of them are already included in the  
3 environmental assessment. So that would be potentially a  
4 motion to dismiss under 12(b)(6).

5 THE COURT: So to get back to the question I asked  
6 Ms. Kaplan, if your arguments are all right -- and one of the  
7 two of you can answer this -- why wouldn't the appropriate way  
8 to handle it be to tee up those issues in Mr. Lester's case at  
9 the same time as summary judgment is filed with respect to the  
10 earlier filed case so that --

11 MR. CHERTOK: We would propose to do that. Our goal  
12 is to have the most expeditious decision making that is  
13 reasonable. And in terms of the other claims that we think are  
14 not ripe, for example, the supplement claim and the claim for  
15 the Green Amendment, which is apparently going to be added,  
16 those all depend on a final tolling structure, including the  
17 Dormant Commerce Clause claim. So there's no reason to have  
18 those claims addressed now. And once there's a decision under  
19 NEPA on the adequacy of the FONSI, then those matters may be  
20 moot, or more likely in our view, they can then proceed. But  
21 you can't really determine what the impacts are until there's a  
22 final tolling structure and a reevaluation by the FHWA.

23 THE COURT: Okay.

24 MS. KAPLAN: If it makes sense, your Honor, what we  
25 would propose to do is attempt to negotiate or consult with our



O2CANEW C

1 adversaries about a global schedule. Some issues, as you heard  
2 my colleague say, would require motions to dismiss, some would  
3 require -- since you need the administrative records for  
4 summary judgment, there's no reason those couldn't be made on  
5 the same schedule because, as we have said, discovery here we  
6 think would be inappropriate at this stage. And if the parties  
7 can't agree, we can come back to your Honor on that, but I  
8 think we're on the same page getting this done all together, as  
9 quickly, expeditiously, and efficiently as possible.

10 THE COURT: And, Ms. Kaplan, with respect to the Chan  
11 case, as to which I hear you talking about a motion for summary  
12 judgment, do I need an answer in those cases before you proceed  
13 to summary judgment, just as a procedural matter?

14 MS. KAPLAN: In the New Jersey case, your Honor, there  
15 were no answers before -- but we don't need an answer here.

16 THE COURT: Okay.

17 MS. KAPLAN: We waive that. The only other thing I  
18 wanted to touch on, your Honor, that you asked is global  
19 settlement. I just wanted to correct the record slightly. In  
20 the New Jersey case, there have been settlement discussions,  
21 court-ordered settlement discussions, under the auspices of the  
22 magistrate judge there, Wettre. It may make sense -- and she's  
23 quite familiar with some of these issues -- if there were to be  
24 a global settlement procedure, to at least have her involved  
25 because she's been dealing with this already for some time.

O2CANEW

1 MR. CHERTOK: And I would add one point, your Honor,  
2 about the New Jersey case so it's clear. The plaintiffs there  
3 all sought -- the New Jersey plaintiffs sought to amend its  
4 complaint to add the Dormant Commerce Clause and right to  
5 travel claims, and the Court there denied that request to so  
6 move because it was unnecessary at this point to make a  
7 decision on that due to prematurity. It also stayed the other  
8 case which had class action -- has class action claims for  
9 similar reasons. There was no reason to tie up the Court, and  
10 that could be a similar approach here, your Honor.

11 THE COURT: Yeah. But my understanding from the New  
12 Jersey case is that one of the two cases before the judge was  
13 significantly progressed, there was summary judgment motions  
14 fully submitted, and the other had just been filed. So this  
15 case is one in which there haven't been motions filed in either  
16 case. I mean, while one of the two cases was filed  
17 significantly earlier than the other, procedurally they're both  
18 at essentially the same stage; isn't that right?

19 MR. CHERTOK: That's correct in one sense. The later  
20 case, which has the class action, that case basically the  
21 plaintiff has indicated all it will do is submit a letter  
22 saying we agree with the NEPA claims brought by New Jersey and  
23 presumably participate in the oral argument, which is set for  
24 April at this point on that issue. But the class action aspect  
25 of that case has been stayed.

O2CANEW

1 THE COURT: Okay. Ms. Kaplan, to the point of global  
2 settlement.

3 MS. KAPLAN: Yes, your Honor.

4 THE COURT: Again, it's my preference not to get in  
5 the middle of that and really to try to structure motion  
6 practice and to decide the legal issues. I would assume that  
7 the MTA, as one of the largest if not the largest stakeholder  
8 here, would be well suited --

9 MS. KAPLAN: I think that's correct.

10 THE COURT: -- to coordinate with all of the  
11 interested parties to make sure that settlement discussions go  
12 forward; is that a fair assumption?

13 MS. KAPLAN: I think it's a fair assumption, your  
14 Honor. I think we're the only party that would be involved for  
15 sure in all the settlement discussions, so that makes complete  
16 sense, your Honor.

17 THE COURT: And when you offer to meet and confer with  
18 respect to a motion schedule, did you have a timetable in mind?

19 MS. KAPLAN: We had been talking preliminarily on our  
20 side, but we haven't talked with the other side. Again, we  
21 would want to tee it all up so it would be ready for your  
22 decision with a period of time in accordance with the mid-June  
23 dates we had been talking about.

24 THE COURT: I guess what I had in mind is by when  
25 would you be prepared to send me a letter with a proposed

O2CANEW

1 schedule? What's your druthers?

2 MS. KAPLAN: Very shortly, your Honor. Within the  
3 next -- certainly this week, within the next couple days.  
4 Honestly, to be quite honest, your Honor, we're coordinating  
5 with some vacation schedules for counsel. So as soon as we get  
6 that squared away and can talk to the other side, we can submit  
7 certainly, certainly by the end of this week.

8 THE COURT: Okay.

9 MS. KAPLAN: And, again, I think summary judgment and  
10 motion to dismiss could essentially happen at the same time.  
11 That's what happened in the case I litigated because these are  
12 essentially all the same issues here.

13 THE COURT: So is there anybody else for the MTA who  
14 feels the need to be heard?

15 Okay. And I think I heard from the Office of the  
16 Attorney General. Is that -- no, I didn't. Mr. Taylor, you  
17 represent -- I'm sorry, the gentleman next to Ms. Kaplan is  
18 also from Kaplan Hecker?

19 MR. CHERTOK: No. I'm from Sive, Paget & Riesel and  
20 we're cocounsel for MTA, TPA.

21 THE COURT: Got it. So let me now turn to Mr. Frank,  
22 to the New York Attorney General's Office, and then to the New  
23 York City Law Department to see what you have to add.

24 MR. FRANK: Good morning, your Honor. Not much to  
25 add. We agree with Mr. Chertok as to the general description

O2CANEW

1 of the adequacy and thoroughness of the environmental review.  
2 So we do not believe that there are any flaws here that the  
3 Court could provide a relief on.

4 In terms of the litigation structure going forward, we  
5 buy and large agree with what Ms. Kaplan has laid out, either  
6 motions to dismiss or motions for summary judgment, they could  
7 be done at the same time. We have not had a chance to talk --  
8 I've not had a chance to talk to my client in terms of whether  
9 we have a ground to dismiss the Chan case as opposed to just  
10 want to go straight to summary judgment. Particularly, since  
11 as we've just learned this morning some of the other claims may  
12 be added, the Dormant Commerce Clause, Green Amendment, right  
13 to travel. So I will need to talk to my client there.

14 Having said that, whatever the outcome might be, I  
15 would imagine that we will be able to work with counsel for the  
16 MTA and Triborough so that whatever we would like to do is not  
17 going to upset the apple cart and make the litigation any more  
18 time consuming than it needs to be. And one other thing I  
19 would need to confer with my client about is whether or not we  
20 waive an answer. And on both of those later points, I am not  
21 taking a position at this point as to, you know, what exactly  
22 we want to do. I just want to note for the Court that I will  
23 need to speak to my client about that. But I think those  
24 conversations could happen pretty soon and so we would be able  
25 to stay on the schedule that Ms. Kaplan has laid out for

O2CANEWC

1 getting more information to your court by the end of the week.

2 THE COURT: Okay. Counsel for the law department, and  
3 then last but not least, the federal defendants.

4 MR. TAYLOR: Thank you, your Honor.

5 I'm Nathan Taylor for New York City Department of  
6 Transportation. We agree with MTA that in the New Yorkers  
7 Against Congestion Pricing case, that none of the causes of  
8 action at this point can survive a motion to dismiss, and we  
9 intend to make such a motion. We also agree that in the Chan  
10 case, it would be appropriate to coordinate schedules for  
11 summary judgment, but the city is prepared to participate in  
12 any global discussions on either scheduling or global  
13 settlement negotiations. We don't expect to play the lead role  
14 in any of these discussions, but we are very happy to  
15 participate. I also have not had a chance to speak with my  
16 client on the issue of waiving an answer, but we'll also  
17 provide that response soon.

18 THE COURT: All right. For the federal defendants?

19 MR. BANNON: Zach Bannon from the U.S. Attorney's  
20 Office. I also have little to add and agree with everything  
21 that's been said by cocounsel here and would say that if there  
22 are going to be global settlement conversations, they likely  
23 will not have detailed involvement from the federal defendants  
24 on those conversations. In light of the EPA causes of action  
25 here, we're of course happy to participate if the other parties

O2CANEWC

1 would like them but otherwise are happy with the schedule  
2 that's been laid out.

3 THE COURT: Okay. Before I turn back to the  
4 plaintiffs, I do have one thought that I wanted to share with  
5 the plaintiffs, and maybe it's a bit of a request also, which  
6 is, there are a lot of you, and I'm thinking about what it's  
7 going to look like if I have lengthy motion papers from each of  
8 you essentially repeating the same arguments. I'm not going to  
9 require you to file a single memorandum, unless you are willing  
10 to undertake that. You each have your own respective clients.  
11 But I am going to ask you when you meet and confer to meet and  
12 confer with respect to whether there is one party who might  
13 take the lead in making the arguments common to the defendants,  
14 and then others who would just be simply content with relying  
15 upon the arguments made by that party. If part of the  
16 objective is to get a quick decision, one way to make that  
17 difficult is for you each to file lengthy briefs.

18 So, Ms. Kaplan, that's on your to-do list.

19 MS. KAPLAN: Understood, your Honor. We will  
20 undertake that.

21 THE COURT: Okay. All right. Let me turn back to  
22 Mr. Klinger first.

23 Mr. Klinger, is there any way, first of all, that you  
24 can file your amended complaint by a week from today?

25 MR. KLINGER: We will endeavor to do so, your Honor.

O2CANEW

1 THE COURT: Okay. So the amended complaint will be  
2 filed by February 19. That will permit there to be some  
3 briefing with respect to the amended complaint.

4 Let me hear you about meeting and conferring with the  
5 plaintiffs and teeing up the motion practice. What I also have  
6 in mind is that if you have a request for discovery, teeing up  
7 whether discovery is appropriate at least with respect to the  
8 environmental law claims, the Dormant Commerce Clause claims,  
9 if you assert that they may not be ripe and obviously raise  
10 different issues with respect to discovery.

11 MR. KLINGER: They do, your Honor. And I want to just  
12 address one aspect of what was said earlier by MTA counsel.

13 We understand, your Honor, that this project has been  
14 out there for four years or so. On the other hand, what I  
15 think is being missed, your Honor, is that it wasn't until  
16 spring 2023 that the FONSI was put out. And, your Honor, it  
17 wasn't until mid-December, just recently, that the tolling  
18 program was put out that there was a decision made. And, your  
19 Honor, some of the issues that are in Mr. Lester's complaint,  
20 the claims, are in the Mulgrew and Staten Island present action  
21 in the Eastern District of New York. So we're familiar with  
22 the issues there and the notion, your Honor, one, that if the  
23 implication was that any of the plaintiffs' groups have been  
24 sitting on this and only at the last minute are coming in, it  
25 wasn't until December that the public knew what the actual plan



O2CANEW

1 was going to be.

2 The other thing which is curious is you heard, your  
3 Honor, the acknowledgment from the defendants that there  
4 actually now has to be a reexamination now that there actually  
5 is a tolling plan, and there actually isn't even a tolling plan  
6 now because you have this subsequent comment period and  
7 hearing. So I'm not exactly sure how anything can be time  
8 barred.

9 THE COURT: I don't hear an argument being made that  
10 your complaint is time barred.

11 MR. KLINGER: Well, you're going to hear it in the  
12 Mulgrew case, your Honor, if that gets transferred here. But,  
13 your Honor, if you think about it, if the defendants were --

14 THE COURT: So, help me again. If the principal  
15 request is for declaratory and injunctive relief, isn't that  
16 relief ordered in one case going to be sufficient with respect  
17 to all cases? If I enjoin the congestion pricing plan for  
18 failure to have implemented an environmental impact statement,  
19 then, you know, whether the folks in New Jersey are going to be  
20 benefited from that or only the folks in the Lower East Side,  
21 it's a matter of indifference. The plan is still going to be  
22 suspended, so --

23 MR. KLINGER: You're right. That's right, your Honor.  
24 But the question is if you want to talk about efficiency, if --  
25 look, the MTA has said, your Honor, not only did they say, you

O2CANEW

1 know, in connection with the review that the MTA has heard from  
2 the Federal Highway Administration that they will be fast  
3 tracking the MTA's environmental process, which will certainly  
4 get the MTA moving forward towards being able to realize this  
5 source of funds and institute this congestion pricing, not only  
6 did they say that then, but what they've said, your Honor,  
7 now -- and I'm not saying that this was with the advice of  
8 counsel -- what they said now in response to all of the  
9 lawsuits that have been filed, they've said, your Honor, it's  
10 nothing to them, we're going forward. And, whatever, I'm not  
11 technologically savvy, whatever the mechanism is that will  
12 implement the tolling, they're going up around, all around the  
13 city right now. The MTA has basically said that, you know, it  
14 doesn't really matter, it's a foregone conclusion what is going  
15 to happen.

16 And I would believe, your Honor, that there will  
17 likely be -- but you can't say for sure -- that there's likely  
18 going to be a new wave of challenges when it comes out that  
19 they're not changing anything.

20 THE COURT: Let me interrupt you for a second because  
21 I do have a question for counsel for the MTA, which goes to the  
22 point of there being different cases.

23 I don't have any New Jersey residents I don't think in  
24 this case. If one of the arguments that would be made in New  
25 Jersey, or frankly for that matter made in the Eastern District

O2CANEW

1 of New York, would be, Judge, don't look at the complaints that  
2 the administrative agency failed sufficiently to consider the  
3 New Jersey people or the people in the Eastern District because  
4 they're not plaintiffs in this case; is that the type of  
5 argument you imagine making? If so, it's sort of readily cured  
6 by having the plaintiffs in those cases join the case that's  
7 before me and that was timely filed.

8 MS. KAPLAN: Yes, your Honor. I mean, we agree to the  
9 extent that the New York cases, the cases involving people who  
10 live in New York, which is the EDNY case and the case before  
11 your Honor, should be decided together by one judge. It's just  
12 completely inefficient to do it any other way. To use a fancy  
13 legal phrase, your Honor, New Jersey is New Jersey. And that's  
14 happening in New Jersey right now. And, again, a newly  
15 assigned judge, but you know the status in those cases.

16 THE COURT: All right. Let me turn back to you,  
17 Mr. Klinger. I apologize for interrupting you.

18 MR. KLINGER: No, your Honor. I think your Honor has  
19 the gist of what we are saying. I mean, there is a new comment  
20 period, and as of this date we actually don't have a congestion  
21 pricing plan.

22 THE COURT: No, I heard that. I understand that there  
23 is more work to be done before there is a plan that can go into  
24 effect.

25 MR. KLINGER: And the one thing, your Honor, which I

O2CANEW

1 think I speak for Mr. Lester, correct me if I'm wrong, or our  
2 cocounsel in the Mulgrew case, what we don't want, your Honor,  
3 is to hear with all the claims that things aren't ripe yet.  
4 That's what we're hearing, you're too late, you're too early,  
5 you're nowhere to be had. What we think would be quite unfair,  
6 your Honor, is to be told at some point in the future, the plan  
7 is so far advanced, how can you do anything about it. That's  
8 why we're here now. That's why we've brought the claims that  
9 we have in the Eastern District action, which is the Dormant  
10 Commerce Clause and the right to travel. We understand what  
11 defendants' arguments are going to be there, but we wanted to  
12 make sure that these issues are before not only the Court, but  
13 before the parties in connection with the supplemental review  
14 that they've acknowledged has to be undertaken.

15 THE COURT: And will you meet and confer with  
16 Ms. Kaplan either right after this conference or certainly by  
17 the end of the day today with respect to whether your position  
18 with respect to transferring the Eastern District case to me,  
19 or at least if you're not agreeing to that, to a motion  
20 schedule so that the letter that I get at the end of this week  
21 is one that would reflect either that there will be a motion  
22 sub judice with respect to the Eastern District, or that  
23 there's consent by both parties to moving the Eastern District  
24 case here.

25 MR. KLINGER: The answer, your Honor, is I would just

O2CANEW

1 ask until tomorrow because I have to reach cocounsel in  
2 addition to reaching our respective parties. But we will  
3 have -- we will have an answer to Ms. Kaplan tomorrow if that  
4 is all right.

5 MS. KAPLAN: Thank you, Mr. Klinger.

6 THE COURT: All right. Mr. Klinger, anything I should  
7 hear from you -- I'm sorry, I meant Mr. Lester.

8 MR. LESTER: Thank you. I think two points. The  
9 State Administrative Procedure Act is intertwined with the NEPA  
10 review because the state's position, the MTA, and the Federal  
11 Highways' position, is that the FONSI is not finalized until  
12 they complete the SAPA review. So it has to be more than rate  
13 making. This is inextricably intertwined with the whole  
14 environmental review process. So the fact that they would on  
15 the one hand say NEPA has not been finalized because of the  
16 State Administrative Procedure Act, and then on the other hand  
17 say it's merely rate setting, I think is contradicted by the  
18 record and by their own statements.

19 THE COURT: Okay.

20 MR. LESTER: So I would just make that point in terms  
21 of statute of limitations and the ripeness argument.

22 THE COURT: Okay. I'm sure I'll hear more about that  
23 in opposition to defendants' motion.

24 MR. LESTER: Right. I mean, I knew we weren't getting  
25 into the merits today, but since they raised it, I thought I'd

O2CANEW

1 respond.

2 THE COURT: Okay. So, Ms. Kaplan, by the end of the  
3 day on Friday you will submit to me a letter reflecting a  
4 proposal by the defendants, hopefully agreed to by the  
5 plaintiffs, with respect to motion practice on the two cases.  
6 I would appreciate you also, in addition to thinking about how  
7 to coordinate the motion papers so that they're not  
8 duplicative, thinking about something like what I understand is  
9 being done in the District of New Jersey, that in addition to  
10 the filing of the complete certified administrative record,  
11 that there be some process for identifying those portions of  
12 the administrative record that will be pertinent to the  
13 motions. And I assume from the plaintiffs' perspective, you're  
14 going to cooperate with the defendants on that?

15 MR. KLINGER: Certainly, your Honor.

16 MR. LESTER: Yes.

17 THE COURT: Okay. I'm obviously not going to judge  
18 the matter that's before Judge Gujarati in terms of the  
19 transfer issue. But the plaintiff in the New Jersey action,  
20 who's also plaintiff's counsel here, will meet and confer with  
21 Ms. Kaplan by the end of the day tomorrow with respect to the  
22 transfer issues.

23 There's no issue right now about discovery before me,  
24 but so I would encourage Mr. Klinger to tee that up quickly  
25 after the filing of an amended complaint. What I do have in

O2CANEW

1 mind is resolving the environmental law issues as expeditiously  
2 and efficiently as I can, and leaving, if there are Dormant  
3 Commerce Clause issues, leaving them out there to be litigated  
4 outside of the motion practice.

5 MR. KLINGER: Understood, your Honor.

6 THE COURT: Is there anything else from plaintiffs  
7 that we should address today?

8 MR. LESTER: Yes, I think we probably also join in the  
9 Green Amendment issue, especially because we have these  
10 environmental justice communities that require special  
11 protection.

12 THE COURT: Okay. Anything --

13 MR. KLINGER: One last thing, your Honor, very  
14 quickly. And I just want to make clear to the Court the  
15 Eastern District action is heavily focused on Staten Island.  
16 If the client's decision is made not to consent to transfer, we  
17 understand that a motion would be made. We just don't want the  
18 Court to take any affront about your Honor's role.

19 THE COURT: I won't take any affront, and I'll leave  
20 it at that.

21 Anything else from the defendants' table?

22 MS. KAPLAN: Nothing, your Honor.

23 THE COURT: Okay. Have a good day, everyone. Thank  
24 you.

25 (Adjourned)